

THE WEBINAR WILL BEGIN SHORTLY.

THE DOL'S FIDUCIARY PROPOSAL AND PROHIBITED TRANSACTION EXEMPTIONS

FRED REISH, ESQ.

JANUARY 31, 2024



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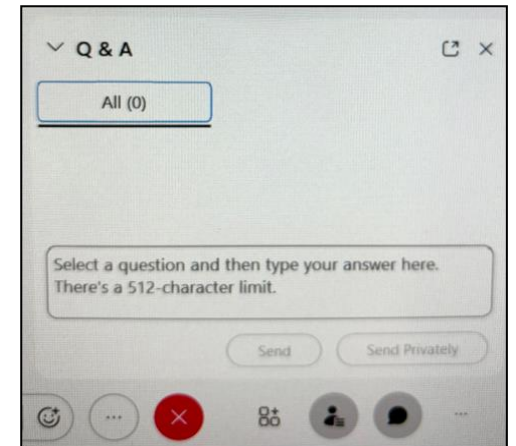
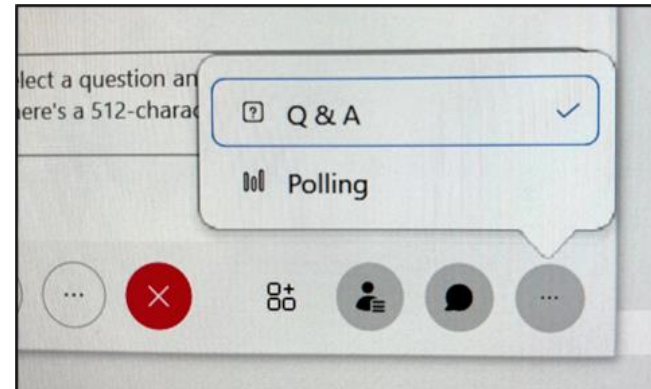
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Agenda

- CEFLI's Antitrust Policy.
- Access to the recording and slides.
- Certificate of Attendance.
- Q&A - Please use the Q&A Feature (not the Chat feature).
- Introduction of Fred Reish
- Presentation
- Administrative Reminders



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Fred Reish is a partner in the international law firm of Faegre Drinker Biddle & Reath, LLP. His practice focuses on fiduciary responsibility, prohibited transaction and plan qualification issues. He has been recognized as one of the “legends” of the retirement industry by both PlanSponsor and PlanAdviser magazines. He has also been given lifetime achievement awards by Institutional Investor and PlanSponsor publications and received recognition by the Internal Revenue Service for his contributions to the retirement community.

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The DOL's Fiduciary Proposal

The essence of the DOL's fiduciary proposals and their impact on distribution of annuities is found in:

- Retirement Security Rule: Definition of an Investment Advice Fiduciary
- Proposed Amendment to Prohibited Transaction Exemption 2020-02
- Proposed Amendment to Prohibited Transaction Exemption 84-24

The Proposed Definitions of Fiduciary Status

The proposed fiduciary regulation has three definitions of fiduciaries, one of which will apply to a wide range of annuity recommendations to “retirement investors”—

- ERISA and qualified private sector retirement plans,
- Participants in those plans (including rollover recommendations), and
- IRAs (including transfers and exchanges)—individual retirement accounts and individual retirement annuities.

The Proposed Definitions of Fiduciary Status

The three definitions are:

- Discretionary management
- Acknowledgment of fiduciary status
- Non-discretionary fiduciary advice

The Proposed Definitions of Fiduciary Status

The definition of non-discretionary fiduciary advice is (and it would replace the current five-part test):

The person...

- *makes investment recommendations to investors on a regular basis as part of their business and*
- *the recommendation is provided under circumstances indicating that the recommendation*
 - *is based on the particular needs or individual circumstances of the retirement investor and*
 - *may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.*

Covered Recommendations

The proposed regulation covers three categories of fiduciary recommendations, two of which could apply to recommendations of annuities:

- *As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or **as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;***

Covered Recommendations

- *As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.*

Prohibited Transactions and Exemptions

The DOL fiduciary definitions apply to ERISA governed plans as a standard of conduct and for determination of prohibited transactions (that is, prohibited conflicts of interest).

The definition is also used in the Internal Revenue Code for determining whether prohibited transactions have occurred, but not as a standard of care.

In addition, the DOL has the authority to issue exemptions, or exceptions, from the prohibited transactions in the Code and ERISA.

Prohibited Transactions and Exemptions

Under current rules, insurance companies and producers can use either PTE 2020-02 or PTE 84-24 for protection from prohibited transactions.

However, under the proposals:

- PTE 2020-02 could be used for all prohibited transactions related to recommendations of insurance products, but the insurance company would have to serve as a co-fiduciary with the producer;

Prohibited Transactions and Exemptions

- PTE 2020-02 would have to be used for **annuities that are securities** and would have to be used where **employees or statutory employees** are the producers; and
- PTE 84-24 could be used for independent producers (and only for independent producers) for fiduciary recommendations of insurance products that only require an insurance license and, in that case, the insurance company would not be a co-fiduciary, but would have enhanced oversight responsibilities.

Prohibited Transaction Exemption 2020-02

PTE 2020-02 generally requires satisfaction of these conditions:

- Impartial Conduct Standards
- Disclosures
- Policies and procedures
- Annual retrospective review and report
- Correction of identified failures

Prohibited Transaction Exemption 84-24

PTE 84-24 has similar requirements, but the insurance company is not a co-fiduciary with the *producer*. *The conditions are:*

(1) The **Independent Producer's** investment advice is, at the time it is provided, in the Retirement Investor's Best Interest.

...advice is in the Retirement Investor's Best Interest if it:

Prohibited Transaction Exemption 84-24

- (A) reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and*
- (B) does not place the financial or other interests of **the Independent Producer, Insurer** or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party.*

Prohibited Transaction Exemption 84-24

*(2) The **Independent Producer** receives no compensation in connection with the transaction other than the Insurance Sales Commission, and the Insurance Sales Commission does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and*

*(3) The **Independent Producer's** statements to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time the statements are made, materially misleading.*

Prohibited Transaction Exemption 84-24

(b) Disclosure

*Prior to engaging in a transaction described in Section III(g), the **Independent Producer** provides the disclosures:*

- (1) A written acknowledgment that the Independent Producer is a fiduciary under Title I and the Code, as applicable, with respect to any investment recommendation provided by the **Independent Producer** to the Retirement Investor;*
- (2) A written statement of the Best Interest standard of care owed by the Independent Producer to the Retirement Investor;*

Prohibited Transaction Exemption 84-24

(3) *A written description of the services to be provided and the **Independent Producer's** material Conflicts of Interest that is accurate and not misleading in any material respects. The description will include the products the Independent Producer is licensed and authorized to sell. The description must inform the Retirement Investor in writing of any limits on the range of insurance products recommended. The **Independent Producer** must identify the specific Insurers and specific insurance products available for recommendation.*

Prohibited Transaction Exemption 84-24

*(4) A written statement of the amount of the Insurance Commission that will be paid to the **Independent Producer** in connection with the purchase by a Retirement Investor of the recommended annuity. The statement must disclose the amount of expected Insurance Sales Commission, expressed both in dollars and as a percentage of gross annual premium payments, if applicable, for the first year and for each of the succeeding years.*

Prohibited Transaction Exemption 84-24

- (5) A written statement that the Retirement Investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, nature with in sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and describe how the Retirement Investor can get the information, free of charge.*

Prohibited Transaction Exemption 84-24

- (6) *Before the sale of a recommended annuity, the **Independent Producer** considers and documents its conclusions as to whether the recommended annuity is in the Best Interest of the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;*
- (7) **Rollover disclosure.** *Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the **Independent Producer** must consider and document its conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to both the Retirement Investor and to Insurer.*

Prohibited Transaction Exemption 84-24

Relevant factors to consider must include to the extent applicable, but in any event are not limited to:

- (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;*
- (B) the comparative fees and expenses;*
- (C) whether an employer or other party pays for some or all administrative expenses; and*
- (D) the different levels of fiduciary protection, services, and investments available.*

Prohibited Transaction Exemption 84-24

(c) Policies and Procedures

*(1) The **Insurer** establishes, maintains, and enforces written policies and procedures for the review of each recommendation before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests.*

*An **Insurer** is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.*

Prohibited Transaction Exemption 84-24

(2) The **Insurer's** policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor.

Prohibited Transaction Exemption 84-24

*The **Insurer's** procedures identify and eliminate quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in the Retirement Investor's Best Interest, or that subordinate the interests of the Retirement Investor to the Independent Producer's own interests, or those of the Insurer, or to make recommendations based on the Independent Producer's considerations of factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.*

Prohibited Transaction Exemption 84-24

*(3) The **Insurer's** policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed or are likely to fail to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill.*

Prohibited Transaction Exemption 84-24

*A prudent process includes careful review of customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The **Insurer** must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review. . . .*

Prohibited Transaction Exemption 84-24

(d) Retrospective Review

- (1) The **Insurer** conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of the exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any.*

Prohibited Transaction Exemption 84-24

*The retrospective review must also include a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the **Insurer** must prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors.*

*Additionally, the **Insurer** updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with [the policies and procedures requirements].*

Prohibited Transaction Exemption 84-24

*(4) A Senior Executive Officer of the **Insurer** certifies, annually, that:*

(A) The officer has reviewed the report of the retrospective review report;

*(B) The **Insurer** has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transaction discovered by the Insurer in connection with investment advice covered under Code section 4975(e)(3)(B), advised the Independent Producer of the violation and any resulting excise taxes owed under Code section 4975, and notified the Department of Labor of the violation via email to PTE_84-24@dol.gov.*

Prohibited Transaction Exemption 84-24

- (C) The **Insurer** has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and*
- (D) The **Insurer** has in place a prudent process to modify such policies and procedures as set forth in Section II(d)(1).*

Prohibited Transaction Exemption 84-24

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

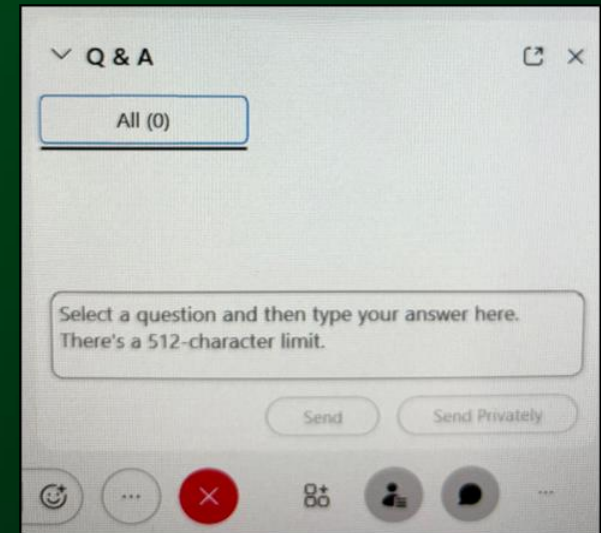
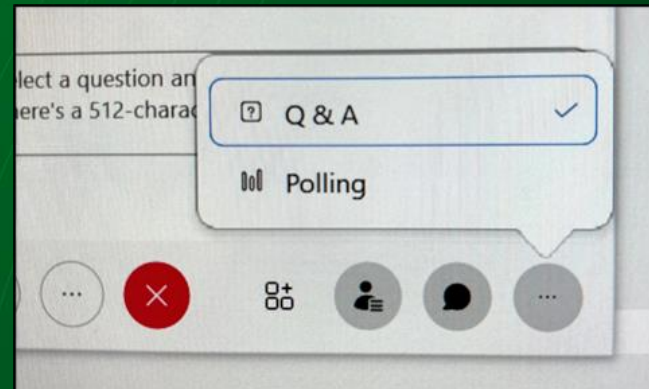
- (1) Either the **Independent Producer** has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, canceling the contract and waiving the surrender charges;*
- (2) The **Independent Producer** notifies the Department of Labor of the violation and the refund or rescission via email to PTE_84-24@dol.gov within 30 days of correction;*

Prohibited Transaction Exemption 84-24

- (3) *The correction occurs no later than 90 days after the **Independent Producer** learned of the violation or reasonably should have learned of the violation; and*
- (4) *The **Independent Producer** notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review....*

Questions

Please use the Q&A Feature (not the Chat feature).



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- Short, post-event survey.
- Within 48 hours you will receive:
 - A PDF of the presentation materials and a link to the recorded event.
 - A Certificate of Attendance template form.

CLE Reference Information

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If you plan to self-submit a copy of the presentation deck and your completed Certificate of Attendance form for **potential CLE consideration** with any State Bar Associations, it may be helpful to know the following:

- All CEFLI Webinars are conducted via Cisco Webex.
- CEFLI is the sponsor of the webinars.
- Participants are required to register, via Webex, for each event to join the live sessions.
- CEFLI provides a Certificate of Attendance only to individuals who register for the event *and who also attended* the live event.
- While we do not utilize bios for Webinar speakers, we reference our speakers by name, title and affiliation in the presentation materials, during the session and on each Certificate of Attendance. Our participants are industry experts in their field and the topics we cover address only life/annuity compliance and ethics matters (we do not have sales or marketing content).
- Unfortunately, we do not have a way of knowing how many attorneys attend CEFLI's event.
- While we do not have a timed agenda, the presentation materials provided to each attendee included an agenda slide regarding topics covered during the one-hour event.
- Participants may ask questions of the speakers during the event by clicking on the Q&A feature in the Webex window during the live session.
- CEFLI is not a marketing organization. It is a compliance and ethics organization. Its mission is to support compliance, ethics, legal and risk management professionals in the life insurance industry by providing helpful insight on current compliance matters and by offering educational opportunities.

Next Month:

- CEFLI's next Educational Webinar will take place on:
Wednesday, February 21, 2024
1:00 PM ET/ Noon CT/ 11:00 AM MT/ 10:00 AM PT.
- CEFLI will provide an overview of the findings from its **2024 AML Benchmarking Survey**.
- Registration is open on the CEFLI.org: Events/ Webinars.



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Thank You for Joining Us!

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